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Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEE NATIONAL ASSOCIATION OF BROADCASTERS

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BRIEF OF APPELLEE NATIONAL ASSOCIATION OF BROADCASTERS

Appellee National Association of Broadcasters ("NAB"), representing commercial broadcast stations nationwide, submits this brief in support of the three-judge district court's judgment upholding Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531 *et seq.* (the "1992 Cable Act").

STATEMENT

Section 4 of the 1992 Cable Act, one of the Act's "must carry" provisions, is based on Congress' considered judgment that cable television's bottleneck monopoly control over access to a majority of video consumers jeopardizes free local broadcast television. Cable's anticompetitive use of its monopoly against local broadcasters harms all consumers of video programming, and particularly threatens the 40% of Americans without cable, who depend on local broadcast television for access to information.[1]

Section 4 is a viewpoint-neutral and content-neutral response to these anticompetitive threats. Section 4 does not restrict, deter or burden the dissemination of any point of view or any subject matter. It leaves cable operators free to disseminate whatever they choose on most of the cable conduit and free to expand their capacity to accommodate any and all programmers of their choice.[2] Section 4's must carry rules do *not* depend on the programming content of local television broadcasters or of nonbroadcast programmers carried on the cable conduit.

[1] Section 4 is codified at 47 U.S.C. § 534. The other "must carry" provision—Section 5, 47 U.S.C. § 535—requires cable operators to carry the signals of certain *noncommercial* educational television stations.

[2] Many of the appellants have announced plans to substantially expand channel capacity in the near future through use of innovations such as fiber optic cable and compression technology. In the near future, typical cable systems will have a capacity of 500 channels or more. J.A. 109-20, 311-18.

Whatever their content, locally originated broadcast signals are eligible for carriage on the portion of the conduit Section 4 sets aside for broadcasters. For these reasons, Section 4 serves vital national interests and, as the district court properly found, poses no danger to First Amendment freedoms.

A. Background

Cable television operators are the dominant distributors of video information to American households, more than 60% of which obtain their video programming through cable. Unlike broadcasters or newspapers, cable operators are not principally engaged in the *generation* of news, information or entertainment. Rather, more like telephone companies, cable operators function principally as conduits. They "simultaneously receive and channel to their subscribers a variety of signals from many sources without [having] advance notice about the . . . content of" the programming provided.[3] Performance of this conduit function involves "editorial discretion" only in the limited sense that cable operators choose—from among local and distant broadcast signals as well as cable programming—an overall package of offerings designed to maximize the operator's profits. As a leading cable lawyer has acknowledged, the "editorial aspects" of this function are "almost entirely theoretical." [4]

Virtually none of the cable systems across the country faces effective competition; a single company owns the conduit in virtually every community. An extraordinarily concentrated group controls this dominant medium. A small number of multiple system operators (MSOs) own the cable systems serving most of the nation, and dictate

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[3] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 707 (1984).

[4] Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 339 (1988); *see also id.* ("For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over the program services provided by others."); *id.* at 342 ("[i]n this capacity [cable] operates as a conduit").

which cable programmers gain access to those systems. The largest, Tele-Communications, Inc. (TCI), alone controls more than 12,000,000 households, or 22.5% of all homes receiving cable. The five largest MSOs control approximately half the nation's cable households, and the 20 largest control more than three-quarters. TCI and many other MSOs are, in turn, controlled by single individuals or families.[5] Thus, a handful of individuals and corporations dictate which video programmers will be available to the large majority of American households, and which will be excluded.

B. The 1992 Cable Act.

Against this backdrop, Congress investigated the need for regulation of the cable industry in lengthy committee hearings in 1988, 1989, 1990, and 1991,[6] compiling a

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[5] Affirmation of Jack N. Goodman, ¶¶ 8-11; J.A. 92-93.

[6] *E.G., H.R. 1303 (Consumer Protection and Competition) and H.R. 2546 (Communications Competitiveness and Infrastructure Modernization): Hearings before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 102d Cong., 2d Sess. (March 20, June 18, June 26, June 27, 1991); *S.12: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 102d Cong., 1st Sess. (March 14, 1991) [hereafter *1991 Cable Act Hearing*]; *S. 1880: Hearings before the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 2d Sess. (March, April 1990); *Oversight of the 1984 Cable Telecommunications Act: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (November 16-17, 1989) [hereafter *Oversight Hearing*]; *"Must-Carry": Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (October 25, 1989) [hereafter *Must Carry Hearing*]; *Commercial Time on Children's Cable T.V.: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (October 18, 1989); *Media Ownership: Diversity and Concentration: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (June 14, 21 and 22, 1989); *Hearings before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 100th Cong., 2d

voluminous empirical record.[7] The "must-carry" provisions alone were the subject of two separate hearings, and hundreds of pages of testimony. The 1992 Cable Act was the product of this exhaustive legislative scrutiny.

Congress set forth its justifications for the Act in unusually detailed and comprehensive statutory findings. Congress expressly found that "[a]s a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services." 1992 Cable Act, § 2(a)(13). Cable now reaches approximately 60% of all American households with television sets, § 2(a)(3), and has effectively replaced over-the-air broadcast television as the primary provider of video programming for those households. §§ 2(a)(17). Cable has become the "dominant nationwide video medium." § 2(a)(3).[8]

Sess. (March 17, 1988); *Cable Television: Hearings before the Subcommittee on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (May 11, 1988) [hereafter *Cable Television Hearings*].

See generally 138 Cong. Rec. S635 (daily ed. Jan. 30, 1992) (statement of Senator Inouye) (1992 Cable Act "is the result of 13 days of hearings and 113 different witnesses . . . [and] [w]e have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens"). Congressional attention to these issues dates back more than 3 decades. *See* Brief Amicus Curiae of the United States Senate, filed in the district court in this case. (Copies have been lodged with the Clerk of this Court).

[7] Congress also considered the records compiled in several FCC proceedings relevant to cable regulation. *See, e.g., Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5038 (1990) [hereafter *FCC 1990 Cable Report*]; MM Docket No. 88-138; "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988; *Report and Order*, FCC MM Docket 85-349 (November 28, 1986); *Second Report and Order*, 2 FCC 2d 725 (1966); *First Report and Order*, 38 FCC 683, 716-19 (1965). These records were themselves voluminous.

[8] The rapid growth of cable systems exceeded even the most optimistic expectations. Just fifteen years ago in *Home Box Office,*

Furthermore, Congress concluded that "local franchising requirements and the extraordinary expense of constructing more than one cable television system" in any single location prevent effective competition in the provision of cable television services to consumers. § 2(a)(2).[9] In 99% of the communities receiving cable service, the cable operator owning the franchise faces no meaningful competition.[10] "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." § 2(a)(2).

This bottleneck monopoly power gives cable operators both the ability (through exclusion of broadcasters or manipulation of their channel positions) and the incentive to harm broadcast competitors. *See* § 2(a)(5). Cable operators have the incentive because "cable television systems and broadcast television stations *increasingly* compete for television advertising revenues." § 2(a)(14) (emphasis added). A cable operator thus faces a choice: it can "assist[] the broadcaster to increase its viewership, and thereby attract additional advertising revenues," or it can deny access and seek to capture those revenues for itself by diverting them to channels occupied by cable programmers. § 2(a)(15).[11]

Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the D.C. Circuit found it inconceivable that cable would become available to even *half* of all television households.

[9] *See Omega Satellite Products Co. v. Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982) (Posner, J.).

[10] *See Oversight Hearing* at 191 (Testimony of the Honorable Sharpe James on behalf of The National League of Cities and the U.S. Conference of Mayors).

[11] Vertical integration within the cable industry exacerbates the risk of anticompetitive harms. Congress found that "[t]he cable industry has become vertically integrated; cable operators and cable programmers often have common ownership." § 2(a)(5). As a result, cable operators have an incentive to favor cable programming in which they own an equity share over programming offered by broadcast stations, irrespective of consumer preferences or the relative quality of the programming. *See id.* Indeed, Congress separately took steps to prevent discrimination by cable programmers not affiliated with cable operators. 1992 Cable Act § 12.

Congress determined that these structural conditions threatened over-the-air broadcasting and, hence, effective competition in the market for video programming. Congress noted that the "marked shift in market share" from broadcast to cable, § 2(a)(13), is accompanied by an accelerating erosion of the advertising revenue that sustains free broadcast television. *See* § 2(a)(14). Congress found that anticompetitive exclusion of broadcast stations from cable had already occurred, and that "[t]here is a substantial likelihood that . . . additional broadcast signals will be deleted, repositioned, or not carried." § 2(a)(15). These risks are so substantial, Congress concluded, that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized," absent remedial legislation. § 2(a)(16).[12]

In particular, Congress identified three interests of the highest order that were at risk:

First, the 40% of American households without cable were at risk of losing all video programming. Congress sought to ensure that this 40% of the public—principally "viewers who are unable to afford other means of receiving programming" § 2(a)(12)—retain access to local broadcast television. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991) [hereinafter "1991 Senate Report"]. Congress made straightforward findings explaining its substantial interest in preserving free local commercial television for this huge population without cable. *See* 1992 Cable Act, § 2(a)(9); § 2(a)(10); § 2(a)(11).

Second, Congress sought to preserve the intrinsic benefits of competition in the video programming market: lower advertising prices and improved product quality. In this respect, Congress simply applied well-established general principles of competitive relations to the familiar problem of a bottleneck monopoly. *See* H.R. 628, 102d Cong., 2d Sess. 63 (1992) [hereinafter 1992 House Report].

[12] *See generally,* FCC 1990 Cable Report.

Third, Congress sought to ensure that the goals of the Communications Act of 1934 would not be frustrated in an era of increasing cable dominance. *See* 1991 Senate Report at 41-42. In the 1934 Communications Act, and in FCC decisions interpreting that Act, two objectives were clearly articulated—that broadcasting would reflect diversity and would serve local needs. Broadcast licenses have been allocated in a manner designed to ensure that there will be a wide diversity of control over broadcast stations and hence a diversity of "voices" in each community. Section 307(b) of the Communications Act requires the FCC to allocate licenses to maximize service to local communities. Congress found that both of these objectives are threatened by the power of cable systems to discriminate against local television broadcasters. 1992 House Report at 50-51; 1991 Senate Report at 42-43.[13]

C. The Empirical Record Before Congress.

Congress' conclusions are based on a legislative record replete with evidence of cable's bottleneck power, and of its abuse of that power.[14] Congress recognized that

[13] Congress also made specific findings as to the need for Section 6 of the Act, the "retransmission consent" provision. Congress found that "a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of" commercial broadcast television. § 2(a)(19). Because, under prior law, cable systems were not required to compensate broadcasters for use of their signals, "[t]his has resulted in an effective subsidy of the development of cable systems by local broadcasters." *Id. See* 1991 Senate Report at 41. The retransmission consent provision, which give commercial broadcasters the option of requesting compensation for carriage of their signals on a cable system, is intended to redress this imbalance.

[14] *See* 1991 Senate Report at 55 n.161 (citing Comments and Reply Comments of NAB in FCC MM Docket No. 89-600 (March 1, 1990) (containing, *inter alia,* Malarkey-Taylor Associates, Economic Analysis of Cable Overbuilds (1987); Noam, Economies of Scale in Cable Television: A Multiproduct Analysis, in *Video Media Competition: Regulation, Economics and Technology* (Colum. U. Press 1985); *Hearings before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary,* 100th Cong., 2d Sess. (March 17, 1988) (testimony of Milton Maltz))).

> "[T]he central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. . . . If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system." [15]

The legislative record demonstrates that cable has become the essential gateway for access to consumers of video programming.[16] The 1991 Senate Report noted "considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal." [17] Congress specifically found that an "A/B switch," which would theoretically permit consumers to switch back and forth between cable and over-the-air broadcast services, was "not an enduring or feasible method of distribution and is not in the public interest." § (2)(a)(18). There was overwhelming support for that finding. For example, ninety-eight percent of cable homes do not have a roof antenna.[18] Fewer than 1% of the homes of cable subscribers have both the A/B switch and the outdoor antenna, or suitable indoor antenna, necessary for off-air reception. *See* 1991 Senate Report at 45; 1992 House Report, at 54-55. Even those with the

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[15] 1992 House Report at 60, *quoting* I. de Sola Pool, *Technologies of Freedom* 168 (1983) (internal quotation omitted).

[16] *See* 1991 Senate Report at 51; *Must Carry Hearing* at 38-39 (Testimony of Edward Fritts and sources cited therein); *Oversight Hearing* at 191 (Testimony of the Honorable Sharpe James on behalf of the National League of Cities and the U.S. Conference of Mayors).

[17] 1991 Senate Report at 45. *See id.* at 45 n.115 (citing information filed by both broadcasting *and* cable interests in FCC MM Docket 85-349 (Dec. 17, 1986)).

[18] *See* 1991 Senate Report at 45 n.116 (citing ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals, and Cable Television" (January 28, 1986)). *See also* NAB Comments and Reply Comments in FCC MM Docket 88-138, *contained in* NAB Comments in FCC MM Docket 89-600, *cited in* 1991 Senate Report at 55 n.161.

necessary equipment find it difficult to operate. *See id.* The FCC had affirmatively found that the cable industry actively "encouraged its subscribers to take down their antennas and to eliminate their capability to receive signals off-air." [19] On behalf of the cable industry, appellant NCTA acknowledged that A/B switches would not work. *See* 1992 House Report at 54 & n.60. Thus, for the 60% of households now receiving cable, local broadcast television cannot gain over-the-air access. As the 1991 Senate Report explained, "[e]vidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems." [20]

The legislative record documents the threat cable's market power poses to over-the-air broadcast television service.[21] The evidence before Congress identified significant and increasing incentives for cable operators to deny carriage or otherwise disadvantage broadcast signals: (i) increasing local cable advertising revenues; (ii) increasing pay subscriptions on cable; and (iii) increasing viewership of national cable programming in which the operator owns an equity stake.[22]

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[19] 1991 Senate Report at 45.

[20] 1991 Senate Report at 51. Congress also relied on the view of FCC Commissioner Quello that "[c]able, once installed, is a geographic bottleneck." *Id.* at 40 (quoting views of Commissioner Quello in FCC Mem. Op. and Order, MM Docket 85-349 (May 1, 1987)).

[21] In the 1992 House Report, Congress relied on the FCC's view that "the lack of must carry obligations . . . creates an imbalance between broadcasting and cable television[,] . . . [t]he nature and effects of [which] are a matter of immediate public policy concern and need to be addressed expeditiously." 1992 House Report at 57 (quoting FCC 1990 Cable Report, 5 FCC Rec. at 5041. (1990)).

[22] *See Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 100th Cong., 2d Sess. (May 11, 1988) (Testimony of Commissioner Quello) ("There is an *increasingly strong incentive* for cable to drop local broadcast signals. Cable operators are now aggressively competing with broadcasters for the advertising dollars that support free programming available to the public on TV stations. Carriage

Congress also identified "substantial objective evidence" that cable operators had *already* abused thier market power to damage their broadcast competitors. 1991 Senate Reports, at 42. In particular, "cable operators have [denied] and will continue to deny local broadcasters carriage on their systems.' *Id.* Congress both relied on a comprehensive survey conducted by the FCC,[23] and concluded that "the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable." 1991 Senate Report at 42-43.[24]

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is no longer an issue of having sufficient channel capacity. The incentive not to carry local stations is purely economic." (emphasis added)). *See also* 1992 House Report at 51 ("ability to sell ads on cable-only channels is perhaps the major incentive for cable operators to drop carriage of broadcasting signals . . . and . . . that incentive *can only grow larger*") (Testimony of Thomas L. Goodgame, Chairman of the Television Board of NAB (emphasis added)); *1991 Cable Act Hearing* at 214 (Testimony of James B. Hedlund (describing the decision of TCI to drop the Learning Channel in favor of a program service in which TCI had an ownership interest); NAB comments in MM Docket 88-138. *See also* NAB Reply Comments in FCC MM Docket 88-138 (July 8, 1988); Michael O. Wirth, *The Economic Impact of Cable on Broadcasting* (1988); Gary M. Fournier, *An Economic Analysis of The Appropriateness of a New "Must-Carry" Rule for Broadcast Stations and Cable Operators* 25-26 (1986); 1992 House Report at 51-52 (citing NAB Reply Comments in FCC MM Docket No. 90-4).

[23] *See* Policy and Rules Division, Mass Media Division, FCC Staff Report, "Cable System Broadcast Signal Carriage Survey" (Sept. 1, 1988) [hereafter "FCC Survey"]. Congress also heard substantial direct evidence concerning the denial of cable carriage to local broadcast television stations. *See, e.g., Must Carry Hearing* at 161-74 (Statement of Brian Holton, General Manager, KTSF (TV), San Francisco); 1992 House Report at 52-53 (citing NAB Comments and Reply Comments in FCC MM Docket 90-4). *See generally* Affirmation of Jack N. Goodman, J.A. 99-106.

[24] *See also Must Carry Hearing* at 176-79 (Statement of the City of New York, Bureau of Franchises) (explaining that, without cable carriage, viewing declines, it becomes impossible to finance local programming and no video programming remains for people in the low-income brackets who do not have cable); *id.* at 79 (Testimony of Preston Padden); *1991 Cable Act Hearing* at 206 (Testimony of James B. Hedlund).

Half of the nation's cable systems responded to the FCC Survey. 869 systems admitted refusing carriage of a total of 704 stations in 1820 instances. In 241 instances, cable operators had denied carriage to three or more local stations, and 113 cable operators had denied carriage to four or more local stations.[25] In the overwhelming number of cases, the replacement for a dropped local television station was a basic cable service in which the cable operator had an equity stake.[26]

The FCC Survey also identified 974 cable systems admitting more than 3,000 instances of repositioning broadcast signals from an established channel to a less desirable channel.[27] "In almost every instance, the stations shifted have been replaced by a cable program in which the system operator is selling advertising or in which the operator has an equity interest or both." 1991 Senate Report at 44 (describing findings of FCC Sur-

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[25] A study submitted by NCTA similarly found "205 cable systems were not carrying, and 2.5 million subscribers were denied access to, all local broadcast stations." 1991 Senate Report at 43 (describing study).

[26] *See* 1991 Senate Report at 43 & n.107 (citing FCC Survey at Table 8); *see also* 1991 Senate Report at 43 & n.110 (citing testimony of Edward Fritts in *Must Carry Hearing; id.* at 55 & n.161 (citing Comments and Reply Comments of NAB in FCC MM Docket No. 89-600 (referring to FCC Comments and Reply Comments of NAB in FCC MM Docket No. 88-138, which document instances of cable operators replacing broadcast signals with cable programming in which the operator owns an equity interest)). *See also 1991 Cable Act Hearing* at 218-221 (testimony of James B. Hedlund). The House Report also documents numerous incidents of cable operators using their market power anticompetitively to disadvantage local broadcast competitors. *See* 1992 House Report at 52-53 (citing NAB Comments in FCC MM Docket 90-4).

[27] Repositioning confounds established viewer expectations and typically relocates local broadcast programming to higher numbered channels that are generally viewed less frequently. *See Must Carry Hearing* at 41 (Testimony of Edward Fritts) (citing an A.C. Nielsen survey).

vey).[28] Typically, the disfavored broadcast signal was *more popular* than the cable programming replacing it.[29] Other studies documented hundreds of instances of similar anticompetitive conduct.[30] As Congress found: "cable operators who carry local broadcast stations have shifted the placement of these stations on their systems," with the "effect of stifling competition." [31]

Based on this record, Congress concluded that cable's bottleneck monopoly power, and its increasing willingness and ability to use that power to disadvantage its only real competitor, placed commercial broadcasting's future in jeopardy. Congress also concluded that those anticompetitive trends were likely to accelerate. 1991 Senate Report at 41-42; 1992 House Report at 52. Cable's share of advertising revenues continues to increase at the expense of broadcast stations, and Congress credited predictions that this tendency would quicken in coming years. *See* § 2(a)(14); 1991 Senate Report at 44. Because "[b]roadcast television programming is supported by revenues generated from advertising," § 2(a)(12), this revenue drain could seriously threaten the "economic viability of free local broadcast television."

[28] *See also* 1992 House Report at 55 (citing testimony of Preston Padden, Pres., of Indep. Television Stations, Inc., *Cable Hearings* at 531 (emphasis omitted)); *Must Carry Hearing* at 222 (Testimony of James B. Hedlund) (INTV's sampling of TCI repositioning showed that 65 of 70 repositionings replaced local broadcast stations with cable networks in which TCI had an equity interest).

[29] *See* NAB Comments in FCC MM Docket 90-4, at 8-9 (least watched broadcast station typically has larger audience than most watched cable channel), *discussed in* 1992 House Report at 53 n.59; 1991 Senate Report at 44; *Must Carry Hearing* at 214 (Testimony of James B. Hedlund) (Cable operators favor programmers in which they own an interest and exert influence against others, such as CNBC and the Learning Channel) & 225 (in most every instance, the higher rated service was shifted).

[30] *See* INTV, Free Television Under Siege, *cited in* 1991 Senate Report at 43 n.110. For example, there is widespread evidence that cable operators have repositioned broadcast stations without notice during "sweeps" periods, in order to maximize the adverse impact on advertising revenues. On one system, one broadcast station was repositioned every year. *See* NAB Comments in FCC MM Docket 90-4 (Sept. 25, 1992); Comments of Chris-Craft Industries in FCC MM Docket 89-600 (March 1990).

[31] 1991 Senate Report at 43.

Thus, Congress made a predictive judgment based on largely uncontroverted facts, including the historical trend favoring cable at the expense of local commercial television, the anticompetitive structural incentives inherent in cable's bottleneck monopoly position, the large volume of statistical and anecdotal evidence that cable operators had already exploited their power in anticompetitive ways, and the evidence that cable's incentive and ability to damage local broadcasting would increase in the future. Based on that evidence, Congress concluded that structural remedies were needed to ensure the long-term survival of local commercial television broadcasting.

D. The Operation of Section 4.

The must carry requirement in Section 4 of the Act is a carefully tailored and narrowly focused structural remedy designed to further these substantial interests. Section 4 imposes a limited obligation on cable operators to set aside up to one-third of their channels for carriage of local commercial television broadcast signals. This access obligation sought to protect only that which Congress found to be particularly at risk: local commercial broadcast television.

The impact of Section 4 is limited. For the large majority of cable systems, the number of local commercial television stations eligible for must carry is substantially less than the number of reserved channels. Stations that have duplicative programming, that have inadequate signals, or that require payment of copyright fees, also need not be carried. After carrying a specified number of stations, the cable operator may refuse to carry additional local commercial television stations.

Commercial television stations may also elect not to exercise their rights under Section 4, choosing instead the right to negotiate with the cable system to be compensated for carriage (the right of "retransmission consent," established by Section 6 of the Act). Section 4 imposes no obligation on cable operators to carry the signals of stations that elect to pursue retransmission consent, but every local signal the cable operator chooses to carry pursuant to the retransmission consent provision counts towards satisfying the operator's must carry obligation. Retransmission consent therefore has the effect of reducing the must carry obligations for commercial stations. 47 U.S.C. § 325(b)(14).

E. The District Court Decision.

Within hours after enactment of the 1992 Cable Act, and well before its effective date, Turner Broadcasting System filed an action in the District Court for the District of Columbia asserting a facial challenge to Sections 4 and 5. Other cable operators and cable programmers filed similar challenges. The cases were consolidated on motions for preliminary relief and summary judgment.

Rejecting these motions, the three-judge district court ruled that the must carry provisions are constitutional under *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting a "compelled speech" claim similar to appellants' claim), *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (rejecting a "discrimination" claim similar to appellants' claim), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (laws with predominate purposes "unrelated to the suppression of free expression" are *not* subject to strict scrutiny), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (same).[32]

[32] As the district court correctly held, the D.C. Circuit's decisions in *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987); *clarified by*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988), are readily distinguishable. J.S. App. 15a. Those cases struck down particular must carry regulations fashioned by the FCC, but each decision stressed that it remained an open question whether *other* must carry regulations would violate the First Amendment. In both cases, the regulations were found unconstitutional on the narrow ground that there was literally *nothing* in the record to support the FCC's conclusion that they were necessary to further the governmental interests asserted there, or that they were narrowly tailored to serve those interests. *See Century*, 835 F.2d at 300-04; *Quincy*, 768 F.2d at 1455-57, 1459, 1462-63. Congress' extensive findings of fact, supported by the record, plainly distinguish the must carry provisions of the Act from the FCC must carry regulations considered in *Quincy* and *Century*. And the governmental interests supporting the must carry provisions are different from the interests the FCC advanced to support the provisions at issue in *Century*.

All three judges agreed that cable's bottleneck monopoly presents "a very real problem," J.S. App. 50a (Williams, J., dissenting), which Congress can constitutionally remedy by compelling cable operators to grant access to speakers they would otherwise choose to exclude. The majority upheld the must carry provisions because they "are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." J.S. App. 13a. The majority found that "Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech.'" J.S. App. 12a.

The court also rejected appellants' alternative argument that the must carry provisions trigger strict scrutiny because they allegedly favor broadcasters over cable programmers. "[S]peaker partiality alone, the court ruled, "absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. The court held that must carry does not trigger strict scrutiny because it is "unrelated to the content of [the] expression upon which it may have an effect." J.S. App. 19a, *citing Ward*, 491 U.S. at 791.

Because Section 4 was "*justified* by the existing structure of the cable business itself," the court applied the test fashioned in *United States v. O'Brien*, 391 U.S. 367 (1968), J.S. App. 13a, 22a (emphasis added). The court recognized Congress' interest in "promoting fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not," and found that interest to be substantial. J.S. App. 23a. And the court found Section 4 to be "narrowly tailored" to further that interest, because it does "not unnecessarily burden a substantial amount of [appellants'] speech," and "leaves open adequate—in fact, plentiful—alternative, intra-medium channels of communication for cable speakers to deliver whatever messages they choose." J.S. App. 27a-28a.

Although Judge Williams rejected the legal arguments central to appellants' claims, he dissented based on an argument appellants do not make. He concluded that "consistent with the First Amendment" Congress *can* address the "bottleneck" problem by "compulsory access" for speakers cable operators would otherwise choose not to carry, but asserted that Congress must mandate access for "*all* parties that meet neutral criteria." J.S. App. 50a-51a (emphasis added). *See* J.S. App. 59a, 60a-61a, 66a-67a, and 71a.[33] Thus, the crux of Judge Williams'

[33] The remedy Judge Williams proposed would have been far more burdensome to cable operators than the remedy Congress chose. According to Judge Williams, Congress could "expand the fraction of channels available" for "compulsory access" pursuant to the "leased access" provision of 47 U.S.C. § 532 to the extent necessary to "get broadcast TV into the homes of cable viewers," J.S. App. at 66a, 51a; could "set maximum reasonable rates and other reasonable terms and conditions" for such leased access, J.S. App. at 60a; and, if "broadcasters" could not afford leased access even under those regulated rates, "could subsidize the difference to the extent necessary." J.S. App. at 66a. Under the dissenter's proposal, in order to protect local broadcasters to the extent Congress found necessary while extending "identical" protection to all cable programmers, Congress would have had to impose common-carrier-like carriage obligations over a far *greater* number of channels than are affected by the Act.

concern was that cable *programmers* were not accorded access rights *identical* to those granted local broadcasters.[34]

SUMMARY OF ARGUMENT

Section 4 protects the millions of Americans without cable from losing over-the-air television broadcasting—their sole technological source of video programming—and ensures vigorous competition in the consumer and advertising markets associated with the delivery of video programming. Section 4 prohibits no speech, does not regulate any speech on the basis of its viewpoint or subject matter, and will *increase* the total speech and the diversity of voices available to the public. Thus, Section 4 serves national interests of the highest order and does so in a way that raises no legitimate First Amendment concern. Appellants extravagantly overstate First Amendment doctrine in arguing that Section 4 calls for strict scrutiny.

1. Because Section 4 is *justified* without reference to content, it is subject at most to the less demanding standard of *United States v. O'Brien* and *Ward v. Rock Against Racism*. Point I.A.

2. The First Amendment does not forbid Congress from ensuring access in this context. Like any other content-neutral law, mandatory access laws like Section 4, with purposes unrelated to the content of expression, are reviewed under the rational basis test, *see PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), or at most under *O'Brien/Ward*. The strict scrutiny cases on which appellants rely—such as *Tornillo* and *Riley*—all involved laws that were *justified* by official concern about

[34] Judge Williams failed to consider that the Act gives cable programmers very substantial rights and protections against anti-competitive and unfair practices by cable operators, all of which are designed to ensure that cable programmers will have meaningful access to viewers. *See* 1992 Cable Act §§ 9(b), 11(c), 12, and 19.

the content of speech, and that were triggered by, and prescribed, speech of particular content. Section 4 does not have such infirmities. Furthermore, the First Amendment issues raised when government overrides the editorial discretion of *journalists* simply are not raised by Section 4's regulation of the cable monopoly's anticompetitive economic activity. Appellants should not be permitted, in the name of an attenuated claim of "editorial discretion," to silence other speakers in order to reap monopoly profits. Point I.B.

3. Nor does the First Amendment require Congress to extend an identical access remedy to cable programmers. Unlike local broadcasters, cable programmers do not serve the generally less affluent Americans who do not subscribe to cable; and unlike local commercial broadcasters, cable programmers do not compete with cable operators for local advertising revenues, and thus are not jeopardized by the same anticompetitive incentives. Thus, Congress' content-neutral reasons for protecting the use of local broadcast technology do not apply to cable programmers. This Court has made clear that legislative distinctions among communicative technologies are subject to rational basis scrutiny or—at most—to scrutiny under *O'Brien/Ward*, unless they are "directed at, or present the danger of suppressing, particular *ideas*." *Leathers v. Medlock*, 111 S. Ct. at 1447 (emphasis supplied). Given its content-neutral objectives and operation, no one could credibly claim that Section 4 will suppress any particular ideas. Congress has, in fact, used different, carefully tailored remedies to protect cable programmers from anticompetitive exclusion from local systems, as well. The First Amendment does not deny to Congress the discretion to tailor competitive remedies to the distinct economic circumstances and technological capabilities of different communications technologies. Requiring strict scrutiny for such legislation would disable Congress from responding to the principal policy challenges of the coming era of technological revolution and instability in communications markets. Point I.C.

4. Section 4 plainly satisfies the *O'Brien* test. The governmental interests identified by Congress have already been held to be important and substantial, and Section 4 indisputably furthers those interests. The Congressional judgment that remedial legislation is needed to protect those interests is entitled to substantial deference. Based on a comprehensive and largely undisputed factual record, Congress determined that cable operators exercise bottleneck control over 60% of the market for video programming; that they have already engaged in substantial anticompetitive activity against local commercial television stations; that they have *increasing incentives* to discriminate against local commercial television stations, their only competitors for local video advertising revenues, for which they "increasingly compete"; and that they have *increasing ability* to discriminate. Based on these comprehensive findings, Congress made a *predictive judgment* that, absent remedial legislation, the future health and survival of local commercial television would be seriously jeopardized. That judgment is entitled to respect. Point II.A.

5. Section 4 is adequately tailored because the governmental interests would be achieved less effectively absent the regulation than with it. Congress chose a limited and balanced remedy that aims precisely at the problem Congress identified. Section 4 protects only those local commercial stations most at risk of suffering anticompetitive exclusion. Point II.C.

6. Because Section 4 does not raise a serious First Amendment question, it should be evaluated and upheld under the rational basis test as were similar laws upheld in *PruneYard* and *Leathers*. Point III.

ARGUMENT

I. THE CABLE ACT'S IMPOSITION OF A LIMITED ACCESS REQUIREMENT ON THE CABLE MONOPOLY IS CONTENT-NEUTRAL LEGISLATION.

A. Section 4 Is Unrelated To The Suppression of Expression.

Section 4 prohibits no speech, regulates no speech based on subject matter or viewpoint, and expands the amount and diversity of speech available to the public. Nothing in the intent or operation of Section 4 even remotely suggests a censorial motive on the part of Congress. Section 4 thus poses no threat to freedom of speech.

Because the First Amendment's central function is to prohibit official censorship, "[t]he government's *purpose* is the *controlling* consideration" in ascertaining the proper First Amendment standard of review. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies *only* to "regulations enacted for *the purpose of restraining speech on the basis of its content.*" *Renton*, 475 U.S. at 46-47 (emphasis added). But when government regulates for substantial reasons unrelated to official concern over communicative impact, First Amendment freedoms typically are not threatened. Thus, "*O'Brien's* relatively lenient standard" applies "to those cases in which the governmental interest is 'unrelated to the suppression of free expression,'" *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *O'Brien*, 391 U.S. at 377), or where the legislation is "*justified* without reference to the content of the regulated speech," *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791.

Contrary to appellants' arguments,[35] this inquiry is *not* a "secondary analysis" applied only to time, place and manner laws. As the Court explained in *Ward*:

> *The principal inquiry in determining content neutrality in speech cases generally*, and in time, place or manner cases in particular, is whether the government has adopted a *regulation of speech* because of disagreement with the message it conveys. The government's purpose is the *controlling consideration*. . . .

491 U.S. at 791 (emphasis added) (citations and quotations omitted). Thus, *Ward*'s application of the "governmental purpose" test to time, place and manner cases was simply a particular example of the general rule.

Appellants suggest that any law that refers to particular speech or speakers is automatically content-based, no matter how content-neutral the government's justification. That is not nor could it be the law, as this Court's consistent practice makes clear. In *Renton*, the Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content—"adult" films—because the government's interest in preventing "secondary effects" was unrelated to suppression of the regulated speech.[36] In *Wooley v. Maynard*, the Court applied *O'Brien* to a New Hampshire law compelling display of the "live free or die" motto on license plates, because the State offered a justification for the compulsion unrelated to the content of the expression. 430 U.S. 705, 715-16 (1975). In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), the Court applied *O'Brien* to a law directly prohibiting certain uses of the word "Olympic," because the government's purpose was unrelated to the suppression of expression. 483 U.S. at 537. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), the Court held that an FCC regulation prohibiting newspapers from operating broadcast stations in their local areas was "not content related" and did not trigger strict scrutiny, because the law was justified without reference to the content of the newspapers' expression, even though it flatly *banned*

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[35] *See, e.g.*, TW Br. at 16-17; NCTA Br. at 26-27; Discovery Br. at 23-25.

[36] *See Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2471 (1991) (Souter, J., concurring) (*Renton* "held that that an ordinance . . . was content-neutral . . . because it was *justified* without reference to the content of the regulated speech.") (internal quotation omitted).

speech in a particular medium. *Id.* at 801.[37] *See Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805 (1984); *Procunier v. Martinez,* 416 U.S. 396, 413 (1974). Thus, government's purpose is always the controlling consideration in determining the appropriate level of scrutiny.

Contrary to appellants' claims, this Court's recent decisions in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), and *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), expressly follow these established principles. *City of Cincinnati* invalidated an ordinance banning commercial publications, but not traditional newspapers, from newsracks, despite the city's claim that the ordinance was justified by content-neutral interests in safety and aesthetics. The Court did *not* reject lenient scrutiny on the ground that, notwithstanding its neutral justifications, the ordinance distinguished between commercial and noncommercial speech. Rather, the Court concluded that these neutral justifications had "absolutely no bearing" on that content-based distinction. 113 S. Ct. at 1516. The *only* justification advanced by the City for the discriminatory treatment was its "assertion that the 'low value' of commercial speech" was "a significant justification" for the ban. *Id.* As the Court explained, "[i]t is the absence of a neutral *justification* . . . that prevents the city from defending its newsrack policy as content-neutral." *Id.* at 1517 (emphasis added). Thus, far from supporting appellants' argument, *City of Cincinnati* reaffirms *Ward. Id.*

Nor did *Simon & Schuster* hold the government's justification to be irrelevant, as appellants incorrectly suggest.

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[37] In a brief recently filed in the Fourth Circuit in *Chesapeake and Potomac Telephone Co. v. United States* (nos. 93-2340, 93-2341), appellant NCTA expressly argued, relying on *NCCB*, that the direct regulation of expression imposed by a cross-ownership ban does not trigger strict scrutiny, because such bans "apply to programming that competes in the television market, regardless of its content or of any government views about its content," Br. at 24-25, and "seek[] to promote media diversity," *id.* at 25. Copies have been lodged with the Clerk of this Court.

See TW Br. at 16, 17. To the contrary, *Simon & Schuster* held that penalizing a person convicted or accused of a crime for "the expression of [his] thoughts, feelings, opinions or emotions regarding such crime," 112 S. Ct. at 505, was so badly tailored to the content-neutral justification of "compensating victims from the fruits of the crime," *id.* at 511, that it could be understood only as a penalty on the content of the speech itself. *Simon & Schuster* made clear that *even* a law that directly, and on its face, "imposes a financial disincentive only on speech of a particular content" might nevertheless be reviewed under the *Ward/Renton* test, rather than under strict scrutiny, if the government could demonstrate that the law was "intended to serve *purposes* unrelated to the content of the regulated speech." *Simon & Schuster,* 112 S. Ct. at 508, 511, n. ** (emphasis added).

In any event, unlike the laws at issue in *City of Cincinnati* and *Simon & Schuster,* Section 4 *operates* without regard to the content of any expression. Application of the ban contained in the ordinance in *City of Cincinnati* was "determined by the content of the publication resting inside th[e] newsrack." 113 S. Ct. at 1516. The penalty in *Simon & Schuster* was imposed "only on speech of a particular content." 112 S. Ct. at 508. But Section 4 imposes carriage obligations based solely on the use of specified *technologies* and on broadcasters' and cable operators' *geographic proximity.* The content of programming is entirely irrelevant, and any effect on programming available to cable viewers is thus entirely *incidental.*

The district court was plainly correct not to apply strict scrutiny to Section 4, because it is "justified without reference to the content of the regulated speech." *Renton,* 475 U.S. at 48; *Ward,* 491 U.S. at 791. Congress, *objective*—safeguarding the interests of the substantial number of Americans who depend on free local broadcast television for video programming—is wholly divorced from content. Almost half the households in America have no access to cable programming. Only local television stations serve that huge segment of the population. Thus,

Section 4's structural remedy is designed to protect the economic vitality of broadcast technology by ensuring local television broadcasters access to a sufficiently large audience to generate necessary revenues. As is suggested by its content-neutral operation, Section 4 is in no sense motivated by official desire to suppress cable programming, or by any official judgment that local television programming is more valuable than cable programming. Even if Congress believed cable programming to be superior in every respect, preservation of free local broadcast television is in the vital interest of the tens of millions of Americans without cable, and therefore in the national interest.

Congress' interest in preserving healthy competition in the marketplace for video programming is also unrelated to content. Section 4 specifically targets a host of familiar anticompetitive incentives, opportunities, and effects inherent in any bottleneck monopolist's control of essential facilities, and aims to prevent predictable exploitation of those opportunities. The public will retain the benefits of effective competition, *regardless* of the content of local broadcasting, so long as cable operators are prevented from destroying "the economic viability of free local broadcast television." 1992 Cable Act § 2(a)(16). Section 4 thus responds to market realities, not to the content of cable or broadcast programming.[38]

These justifications do not lose their content-neutral character merely because Congress made additional findings that broadcast television stations are "an important source" of local programming, *id.* § 2(a)(11), and that absent must carry the ability of broadcast stations "to

[38] This conclusion is reinforced when Section 4 is considered in context. The substantial majority of the 1992 Cable Act—including rate regulation, required improvements in cable customer service, and restrictions on cable operators' ability to exclude unaffiliated cable programmers from their systems—responded directly to the problems caused by the monopoly power of cable operators. Section 4 is simply one part of Congress' comprehensive effort to ameliorate the harms caused by the cable monopoly.

originate quality local programming will be seriously jeopardized." *Id.* § 16. These findings simply recognize that free broadcast television has value for the 40% of American households that depend on it for video programming, and that broadcast technology furthers the purposes of the Communications Act by contributing to the diversity of information sources available to the American people. They do *not* represent a judgment that the content of local television programming is (in the dissenting judge's words) "*especially* worthy," J.S. App. 53a (emphasis added); that any *other* programming is "worse"; or that any programming whatsoever should be suppressed.[39] Nothing in the Act or its extensive legislative history suggests Congress held such a view or had such a goal.[40]

These ancillary findings are not content based.[41] Even if they were in some peripheral sense, that would not trigger strict scrutiny of Section 4 because its "predominate" purposes are plainly unrelated to the suppression of speech. *E.g., Renton,* 475 U.S. at 47-49; *O'Brien,* 391 U.S. at 382-86; *Wooley,* 430 U.S. at 716. It would be an exercise in judicial futility to strike down Section 4 based on these ancillary findings if Congress could simply excise those findings and re-enact a constitutional law. *See O'Brien,* 391 U.S. at 384.

[39] Indeed, the extensive protection Congress provided to *cable* programmers in the 1984 *and* 1992 Cable Acts demonstrates conclusively that Congress entertained no invidious objectives. *See* n.49 *infra.*

[40] Congress also made separate findings, relevant only to the *noncommercial* must-carry provision in Section 5 of the Act, that there is a governmental interest in ensuring that "cable subscribers" have access to noncommercial educational stations, § 2(a)(7), Finding ¶ 7; and that the government has a substantial interest in protecting its, and the public's, investment in noncommercial television. Finding ¶ 8; J.A. 5. Unlike Findings 9-11, Findings 7 and 8 do not pertain to the commercial must carry provision, Section 4.

[41] This Court has upheld the Communications Act objectives of preserving a local broadcast structure. *E.g., National Broadcasting Co. v. United States,* 319 U.S. 190 (1943); *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940).

B. Section 4 Does Not Invidiously Compel Speech.

Appellants also argue that any law compelling speech a person would not otherwise make necessarily alters the content of speech, and therefore triggers strict scrutiny. NCTA Br. at 17-18. For good reason, this breathtaking assertion is not the law.

Such a principle would subject to strict scrutiny, and doubtless invalidate, an enormous range of federal and state law, including compulsory process, securities disclosure laws, consumer protection disclosure laws, disclosures mandated by tax laws—in fact, *every* governmentally compelled disclosure requirement.[42] The common carrier obligations imposed by the Communications Act on telephone companies would trigger, and likely fail, strict scrutiny because (like Section 4) such laws may compel carriage of unwanted speakers.[43] The telephone companies themselves, participating in this case as *amici*, understand that appellants' "compelled speech" argument is implausible—and have abjured it for that reason. *See* Brief of United States Telephone Ass'n, *et al.*

Under appellants' sweeping theory, strict scrutiny would apply if local cable franchising authorities sought to set levels of channel capacity or demand interactive capability, because such requirements compel cable operators to carry speech they might prefer not to carry. Section 541(a)(3) of the 1984 Cable Act, which requires franchising authorities to "assure that access to cable service is not denied to any group . . . because of the income of the residents," 47 U.S.C. § 541(a)(3), would likewise trigger strict scrutiny because it compels cable operators to speak to an audience they might prefer to exclude.[44]

As the district court correctly ruled, First Amendment limits on "compelled" speech are far narrower. Indeed, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), on which the district court relied, forecloses appellants' argument. In *PruneYard*, this Court unanimously held that the First Amendment was not even implicated by a California law compelling shopping center owners to permit third parties to use shopping center property to communicate unwanted messages. The Court applied rational basis scrutiny, even though the law frustrated the shopping center owner's choice to "leave unsaid" certain speech. *See* NCTA Br. at 17-18. Appellants do not claim that *PruneYard* was wrongly decided, nor even attempt to argue that *PruneYard* can be harmonized with their extreme position.[45]

PruneYard is precisely parallel to this case. Like the shopping center owner in *PruneYard*, the cable operators here argue that Section 4 forces them to grant access to others whose speech they would prefer to exclude. The cable operators claim they have the right to exercise the same "editorial discretion" the property owner claimed—to prevent certain speakers from using their facilities.[46] But

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[42] Included among the suspect requirements would be the Act's requirement that cable operators carry the same "emergency information" broadcasters are required to carry, Section 16(b); citizens' obligation to testify truthfully pursuant to compulsory process; the tax code's filing and disclosure requirements (26 U.S.C. §§ 6012, 6061); laws requiring disclosure of health statistics (*e.g.*, 42 U.S.C. § 242, 38 U.S.C. § 7332); all disclosure requirements involving publication of periodicals (39 U.S.C. § 3685), employment (*e.g.*, 26 C.F.R. §§ 31.6001-2(a), -4(a)(3)), medical informed consent (*e.g.*, *Marchione v. New York*, 598 N.Y.S.2d 592, 593 (3d Dept. 1992), cash deposits exceeding $10,000 (31 U.S.C. § 5311 *et seq.*), and lobbying activity (2 U.S.C. §§ 261-270).

[43] *E.g.* 47 U.S.C. § 201(a) (wire and radio services); 47 U.S.C. § 11 (telegraph operators).

[44] *See Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991) (rejecting strict scrutiny for universal service requirement). Presumably, appellants' theory would also require strict scrutiny for a law prohibiting cable operators from denying cable service on the basis of a consumer's race or religion.

[45] Appellants argue only that *PruneYard* may be distinguished because "the owner of the shopping center was not itself distributing speech." NCTA Br. at 20. But if, as appellants argue, any compulsion to carry unwanted speech is necessarily "content-based," *id.* at 17-18, this distinction would be entirely irrelevant.

[46] In *PruneYard*, the property owner specifically argued, as do appellants here, that *Wooley v. Maynard* and *Miami Herald Pub.*

here, as in *PruneYard*, appellants' "negative free speech" claims do not implicate the First Amendment, much less trigger strict scrutiny.

This is so because, as *PruneYard* demonstrates, compelled access triggers strict scrutiny only under circumstances not even remotely implicated here. Here, as in *PruneYard*, "no specific message is dictated by" the government, and the obligation to permit third party access is not "trigger[ed] by the owner's speech." 447 U.S. at 87-88. Here, as in *PruneYard*, there is "no danger of governmental discrimination for or against a *particular message*," and no danger that requiring the owner to permit third party speech would "deter" the owner from speaking. *Id.* (emphasis added). Furthermore, here, as in *PruneYard*, the views of those granted access would "not likely be identified with those of the owner," and the owner could "expressly disavow any connection with the message." *Id.* at 87. Like the owner in *PruneYard*, cable operators are not "compelled to affirm [their] belief in any governmentally prescribed position or view," and could readily "dissociate" themselves from views they found objectionable. *Id.* at 88. Moreover, here, as in *PruneYard*, the State's goals are unrelated to the content of speech. For these reasons, as in *PruneYard*, the First Amendment is not even implicated.

As *PruneYard* makes clear, this Court's compelled speech cases simply apply the general rule that the government's justification determines the standard of review. Strict scrutiny applies only if government's purposes are related to communicative impact. This is self-evidently

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Co. v. Tornillo established an absolute right to deny other speakers access to private property to facilitate their speech. *See* Brief for Appellant in No. 79-289, *PruneYard Shopping Center v. Robins*, at 13-14 ("Nor is it persuasive to argue that *Wooley* is inapposite because the patrons of the shopping center may not attribute to [the owner] the views espoused by appellees. . . . What does matter is that [the owner] is being forced by the state to use his private property as a forum for the expression of views, and that he is deprived of the choice guaranteed him by the First Amendment to remain silent or indifferent").

the case when government compels the recitation of an official "orthodoxy" as in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard*, 430 U.S. at 715-16. It is likewise the case when government compels speech in order to counterbalance or correct the content of what the burdened speaker has to say. The right-of-reply statute struck down in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), was properly subject to strict scrutiny for precisely this reason: the stated goal of the statute was "to insure fairness and accuracy" in reporting about elections by requiring replies to speech critical of candidates. *Id.* at 251. The compelled speech law at issue in *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), was likewise based on the government's desire to ensure that PG&E's expression of its own views was counterbalanced by opposing views. As the plurality explained, that "interest is not—and does not purport to be—content-neutral." *Id.* at 20; *see id.* at 6. Similarly, strict scrutiny was appropriate in *Riley v. National Fed'n for the Blind*, 487 U.S. 781 (1988), because the disclosure burden there rested on a governmental concern over the content of charitable solicitations. The *Riley* majority noted that "the desired and intended effect of the statute" was to "discourage" solicitations the State considered misleading or harmful. *Id.* at 789 n.5, 790. *See also id.* at 788-89, 798. As Justice Scalia explained, *Riley* rests on the principle that "the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable." 487 U.S. at 803 (concurring opinion).

Tornillo, *PG&E* and *Riley* all also involved compulsion to engage in speech of particular content, and compulsion *triggered* by speech of a particular content. The right-of-reply statute at issue in *Tornillo* was triggered by criticism of candidates for public office, and therefore penalized and deterred such speech. *Id.* at 257. As the Court explained in *PruneYard*, it was this inescapable *deterrent* effect on particular speech that the *Tornillo* Court "found to be an 'intrusion into the function of editors.'" 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at

258). The compelled speech law at issue in *PG&E* was likewise triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view," 475 U.S. at 9-10 (plurality opinion); *id.* at 30 (Rehnquist, now C.J., dissenting), and "discriminated on the basis of the viewpoints of the selected speakers." *Id.* at 12 (plurality opinion). *See also Riley*, 487 U.S. at 489 n.5.

Section 4 suffers from none of these infirmities. Section 4 is justified entirely *without* reference to content or suppressive intent. It obviously prescribes no orthodoxy or speech of particular content. Its obligations are not triggered by any particular cable content. Section 4 does not deter or penalize an operator's choice to transmit any particular expression, and does not risk diminishing the total speech available to the public. *See PG&E*, 475 U.S. at 31 (Rehnquist, J., now C.J., dissenting) (First Amendment not implicated where access requirement "bears no relationship" to the compelled speaker's" future conduct"). Thus *Tornillo, Riley* and *PG&E* aid appellants not at all.

Appellants simply misread *Tornillo* as vesting the press with a special First Amendment immunity from any interference with "editorial discretion" irrespective of government's purpose. The proposition that the press enjoys a preferred First Amendment position has been squarely rejected. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 781-83 & n. 18 (1978); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (citing cases). *Tornillo* simply followed the general First Amendment principle that government may not penalize or deter the expression of controversial views based on a concern about their impact. *See PruneYard*, 447 U.S. at 88.

Any special right of editorial discretion that survives for the traditional press plainly should not extend to cable operators in the exercise of their bottleneck monopoly. The expressed concern in *Tornillo* was protection of

"newspaper or magazine" editors who determine content through "the exercise of editorial control" or "journalistic judgment," 418 U.S. at 258; *id.* at 259 (White, J., concurring). *Tornillo* expressly distinguished editorial discretion in this form from the conduct of those who principally distribute the expression of others—the "passive receptacle[s] or conduit[s] for news, comment, and advertising." *Id.* at 258 (majority opinion).

Cable operators cannot plausibly claim to be exercising editorial discretion of the kind at issue in *Tornillo*. They do not make daily, weekly or even monthly decisions respecting "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials." *Tornillo*, 418 U.S. at 258. Their discretion typically extends only to deciding which cable programming should go into the "package" offered viewers, and signing multi-year supply contracts with those programmers in the package. Cable operators typically do not review any material provided by programmers and exercise no conscious control over the content of that programming. It is, in short, "economic activity," the "editorial aspects" of which are "almost entirely theoretical" and not real. *See* Brenner, *supra* n.4, at 339.

Furthermore, the purely economic choices appellants seek to immunize as sacrosanct "editorial discretion" are in fact the anticompetitive means by which cable operators inflict harm on their broadcast competitors. Profit maximization provides an ample incentive for cable operators to abuse their control of the conduit in order to deny local broadcasters the ability to reach the 60% of American households with cable.

In exactly this situation, the Court has made clear that even those engaged in expression may be compelled to cooperate with their rivals. In *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951), the Court rejected a First Amendment challenge to an antitrust injunction against a newspaper arising out of its failure to carry advertising from entities that also advertised on a

local radio station. Without raising a substantial First Amendment issue, the injunction properly compelled the newspaper to carry expression it would have chosen to exclude. Consistent with these principles, as this Court has clearly recognized, cable's conduit function has long been regulated to ensure that cable's power does not "destroy or degrade" local broadcast television. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 701-02.

At bottom, appellants urge an interpretation of *Tornillo* that would, in the name of an extremely attenuated First Amendment interest, permit them to use their bottleneck control to silence other speakers in order to maximize their own monopoly revenues. The district court correctly ruled that the First Amendment does not require such a result—a result rejected even by Judge Williams in dissent below. The unanimous Court in *Associated Press v. United States* articulated the First Amendment principle that controls here:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

326 U.S. 1, 20 (1945) (emphasis added).

C. Section 4 Does Not Invidiously Discriminate Among Speakers.

The only remaining question is whether strict scrutiny applies when Congress grants access to the cable conduit to local users of broadcast technology instead of more broadly mandating access for users of *all* technologies transmitting video programming.

The First Amendment does not require Congress to choose a *more* sweeping remedy than it finds is warranted by the economic and technological circumstances it confronts. Legislative distinctions between communications technologies trigger strict scrutiny only when they are

"directed at, or present[] the danger of suppressing, particular ideas." *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991).[47] *Leathers* expressly rejected the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445. *Accord Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983).

Section 4 is not "directed at" and does not "present[] the danger" of suppressing particular ideas, and thus it is not subject to strict scrutiny. In operation, Section 4 differentiates based solely on *technologies*, regardless of what is said or who says it. Section 4 protects broadcast signals (whatever they transmit and whoever transmits them), and not cable transmissions (whatever they transmit and whoever transmits them), because *only* broadcast signals are available to the 40% of American households who do not or cannot subscribe to cable, and because *only* broadcast signals are threatened by cable operators' particular anticompetitive incentive to monopolize local advertising revenues. Protection for a particular technology based upon a status unrelated to the content of ideas does not raise a substantial issue under the First Amendment.[48]

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[47] *See also Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (differential treatment of veterans groups and other charitable organizations); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (differential treatment of existing and future media cross-ownership); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946) (different regulations imposed on small and large newspapers); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946) (same). None of those cases applied strict scrutiny.

[48] Tacitly recognizing that without a content-suppressive legislative goal their discrimination claim is meritless, appellants hint darkly that Section 4 separates "two distinct classes of speech—speech carried on local broadcast stations and all other speech available to cable operators." NCTA Br. at 21. They claim that "drawing any distinction between broadcasters and cable speakers on a class basis would lack purpose, unless Congress had weighed the relative value of their speech and found one, but not the other,

Furthermore, the notion that Congress singled out broadcasters for protection while ignoring the needs of cable programmers is entirely without foundation. Congress created tailored remedies for the distinct problems *each* group has experienced in securing carriage. The record before Congress established that cable operators have discriminated in favor of cable programming services in which they hold an equity interest, and have demanded from unaffiliated programmers, as conditions of carriage, ownership interests and changes in program formats to prevent competition. Section 12 of the 1992 Act bars these practices. Moreover, Section 9 of the Act strengthens the "leased access" provisions of the 1984 Act, which permit unaffiliated cable programmers to compel cable operators to grant them access. No claim of invidious discrimination can be made when Congress has sought to tailor narrow, context-sensitive remedies to the particular problems experienced by different types of program providers.[49]

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wanting." TW Br. at 20-21. In fact, as discussed in text, Congress recited compelling, content-neutral policy reasons for protecting local broadcasting from predation by cable operators, reasons having nothing whatever to do with the content of broadcast or cable programming. Appellants reach new depths of groundless speculation when they claim that Section 4 actually fulfills an unexpressed Congressional desire to foist on the American public programming "of a type specified by the government." NCTA Br. at 11 (quoting J.S. App. 54a). Broadcast programming is certainly *not* "specified by the government." The Communications Act explicitly denies the FCC the power of censorship. 47 U.S.C. § 326. Although licensees are expected to serve the needs and interests of their communities, licensees determine in their discretion what those needs and interests are, and how best to address them. Given the substantial content-neutral bases for Section 4, there is no reason to believe that Congress erected this major piece of legislation on such a paltry censorial foundation, particiularly when Congress has done so much to protect *cable programmers* from the cable bottleneck, as well. *See* note 49, *infra*.

[49] Congressional assistance to the cable industry has been and continues to be enormous. Federal law precludes private and public entities that control facilities *cable* companies need in order to gain

Just as Section 4 does not single out broadcasters for any content-based preference, it does not invidiously single out cable operators for a burden. Appellants make much of the fact that Section 4 is not a law of general application, and expressly take the remarkable position that *any* law that visits obligations on information providers is subject to strict scrutiny. True, laws of general application arouse no suspicion of a censorial purpose, and thus are typically not subject to First Amendment review at all. But a content-neutral law does not lose its content-neutrality because it applies to specified categories of information providers.

Quite the contrary, Congress regularly enacts industry-specific laws, and the First Amendment does not carve out a special immunity for communications technologies. If appellants' categorical rule were correct, virtually all

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access to consumers from exploiting their position to deny or unreasonably charge for such access. In 1978, at the request of the cable industry, Congress authorized the FCC to regulate the rates, terms, and conditions that owners of utility poles could charge for access to their poles. *See* Pole Attachment Act of 1978, 47 U.S.C. § 224 (b) (1). The 1984 Cable Act strengthens that protection and guarantees cable operators access to private easements dedicated by utilities. 47 U.S.C. § 541 (a) (2). Federal law also prevents municipal franchising authorities from imposing unreasonable conditions on cable operators, and from exploiting their leverage during the franchise renewal process. 47 U.S.C. §§ 542 (b), 544 (b).

Federal law has also insulated the cable industry from potentially more powerful competitors. By 1970, the FCC imposed cross-ownership rules that prohibited telephone companies and broadcasters from entering the cable market. 47 C.F.R. §§ 63.54 (a), 75.501 (a) (1970). The 1984 Cable Act codified the cross-ownership restrictions. 47 U.S.C. § 533 (a), (b) (3. And federal law grants cable operators compulsory and preferential access to *broadcast* programming by granting them a compulsory copyright license to retransmit broadcast programming either free or upon payment of nominal royalties. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111. The FCC has concluded that, in the absence of must carry rules, the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced 'contract'," and contributed significantly to cable's "explosive" growth. 1990 FCC Cable Report, at 5038.

of the 1984 and 1992 Cable Acts, virtually all of the Communications Act of 1934 (which specially regulates broadcast and wire communications), all local cable franchising requirements, and a host of other laws would require strict scrutiny. Under appellants' theory, neither Congress nor state or local legislatures could tailor content-neutral regulation to specific public policy problems raised by communications markets or technologies.[50] Appellants offer no rationale for effectively denying to Congress the ability to address regulatory problems in communications industries with sensitivity to their special characteristics and importance.

In fact, the Court has applied strict scrutiny to media-specific statutes *only* if some feature "raise[s] suspicion that" the legislature intended to "interfere with First Amendment activities." *Leathers*, 111 S. Ct. at 1444. Such suspicion is warranted if differential treatment is not "justified by some special characteristic" of the media in question, *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983),[51] or if

[50] Were this a case reviewing an executive or judicial order under the general antitrust laws, on the other hand, all would agree that no First Amendment issue would be posed. *Associated Press v. United States*, 326 U.S. 1 (1945); *Sunbelt Television Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333 (C.D. Cal. 1992). It would be anomalous to hold that Congress may not do by legislation what the other two branches may do by decree. The proper issue in each case is not which branch is acting; it is whether the federal government has acted for economic, or censorial, reasons. Here, as in *Associated Press*, the reasons are solely to promote private competition in the marketplace of ideas.

[51] Appellant Time Warner relies on this portion of *Minneapolis Star*, *see* TW Br. at 29 ("differential treatment . . . suggests that the goal of the regulation is not unrelated to the suppression of expression" (quoting *Minneapolis Star*, 460 U.S. at 585)), but disingenuously elides the critical qualifier that suspicion is warranted *only when* the differential treatment is not "justified by some special characteristic of the press."). Such special characteristics will rarely justify differential tax schemes like those at issue in *Minneapolis Star*, because the neutral goal of raising revenues generally does not apply differently to different media. *Cf. City of Cincinnati*, 113 S. Ct. at 1516 (strict scrutiny applies only where special content-neutral characteristics of differentially regulated speech have "absolutely no bearing on the [content-neutral] interests" asserted by government).

a law singles out a small number of speakers for disfavored treatment, *Leathers*, 111 S. Ct. at 1443-44. In either circumstance, there is reason to fear that the legislature intended to suppress particular ideas. But such fears are *not* warranted here, because non-content-related distinctions between broadcasting and cable justify the differential treatment, and cable speakers are numerous and diverse. *See id.* at 1444-45 (law targeting for disfavor "approximately 100 cable systems" in Arkansas "offering a wide variety of programming" poses no "danger of censorship").[52]

This Court's ruling in *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), is dispositive of appellants' discrimination claim. The Court upheld the FCC's rules banning cross-ownership of newspapers and broadcast licenses in local markets as a "reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802. Even though the rule singled out users of a single medium (daily newspapers) for an outright *ban* on speech through another medium (broadcasting), the Court squarely ruled that it was "not content-related" and did *not* require strict scrutiny. *Id.* at 801. The Court noted that the cross-ownership ban was "in form quite similar to the prohibitions imposed by the antitrust laws," and that "the application of [such] laws to newspapers is not only consistent with, but is actually supportive of the values underlying

[52] Section 4 is therefore very different from the laws at issue in *Minneapolis Star & Tribune Co.*, and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The tax struck down in *Minneapolis Star* was borne entirely by 13 publishers, and two-thirds of the tax burden fell on the Minneapolis Star-Tribune alone. Likewise, the tax invalidated in *Arkansas Writer's Project* burdened no more than three publications and possibly only one magazine. As this Court found in *Leathers*, the suspicion raised by the tax challenged in those cases is not raised by a regulation affecting all cable operators.

the First Amendment." *Id.* at 800 n.18. Section 4 has similarly content-neutral goals, and similarly supports the values underlying the First Amendment.[53]

Buckley v. Valeo, 424 U.S. 1 (1976), is not to the contrary. There, the Court applied minimal scrutiny in upholding provisions that discriminated between major and minor parties in public election financing, because speaker-based legislative classifications based on content-neutral criteria do not require heightened scrutiny. *Id.* at 97-106. *Buckley* applied strict scrutiny *only* to content-based bans that *intentionally* suppressed all speech conducted with expenditures and contributions in excess of $1,000 per person. The *Buckley* Court stressed that Congress' *purpose* in enacting the expenditure limitations that *Buckley* struck down "involve[d] 'suppressing communication' "; Congress viewed the suppressed speech as "harmful" to the public interest, because Congress believed such speech unfairly skewed the political process in favor of moneyed interests. *Id.* at 17 (quoting *O'Brien,* 391 U.S. at 382).[54]

In contrast, Section 4 is justified by factors wholly unrelated to the content of the speech of broadcasters or cable programmers, and nothing in the legislative history suggests that Congress had any intent to suppress any speech. Moreover, the absolute ceiling on protected expressive activity at issue in *Buckley* "*necessarily reduce*[*d*] *the quantity of expression* by restricting the number of

[53] *Arkansas Writer's Project, Inc. v. Ragland* is also inapposite because Section 4—in contrast to the tax law there at issue—does not require "enforcement authorities [to] necessarily examine the content of the message that is conveyed." *Id.* at 230.

[54] *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988), is similarly inapposite. *Cf.* Discovery Br. at 24, quoting *Riley* at 789, n.5. *Riley* applied strict scrutiny to the fee regulation at issue because the regulation was "a direct restriction on the amount of money a charity can spend on fund-raising activity." *Id.* at 788-789. In other words, like the expenditure limit in *Buckley,* the regulation was a content-based *ban* that *intentionally* suppressed all speech conducted with funds beyond the permitted limit.

issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19 (emphasis added). Section 4 does *not* impose a limit on speech; to the contrary, it leaves cable operators free to carry as much speech as they wish, either on existing or expanded channel capacity. In fact, Section 4 is calculated to *increase* the amount and variety of expression available to the American people. The *Buckley* Court expressly distinguished laws, like Section 4 (and the election financing provisions in *Buckley* itself), whose "presumed effect . . . is one of 'enhancing the volume and quality of coverage' of public issues." *Id.* at 48, n.55.[55]

The First Amendment does not prevent Congress from protecting the interests of non-cable households in enjoying continued access to a vital and diverse source of video programming, or from safeguarding from cable operators' anticompetitive activities the broadcast technology that uniquely serves that large group of viewers. Nor does the First Amendment require Congress to extend identical treatment to other technologies that neither serve that population nor face the same anti-competitive risks. As it has done here, Congress may tailor protection to the circumstances as it finds them. The *Buckley* Court recognized that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98 (internal quotes omitted). So long as there is no reasonable basis to suspect that Congress has a suppressive purpose, Congress is free to treat technologies that are different

[55] Section 4 is calculated to protect access by the 40% of American households without cable to a vital and diverse source of programming. As for cable households, when Section 4 was enacted, approximately 9,000 of the Nation's 11,000 cable systems had unused channel capacity. *Compare* Television and Cable Action Update, Feb. 8, 1993, at 4 (over 11,000 cable systems), with Application For Injunction Pending Appeal in this case, No. A-798, at 17, n.22 ("about 2,000 cable systems . . . currently have no excess channel capacity"). Those 2,000 systems, of course, are free to expand their capacity without governmental or meaningful technological constraints, and many are planning to do so. *See* note 2, *supra.*

in a manner consistent with those differences in furtherance of the public interest.

II. THE DISTRICT COURT PROPERLY UPHELD SECTION 4 UNDER O'BRIEN.

Under *O'Brien's* "relatively lenient test," [56] a law is constitutional if 1) it "furthers an important or substantial governmental interest"; 2) "the governmental interest is unrelated to the suppression of free expression," 391 U.S. at 377; and 3) the "government interest . . . would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (construing the *O'Brien* test); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (same). Section 4 easily passes this test.

A. Section 4 Furthers Important And Substantial Governmental Interests.

This Court has repeatedly held that the very interests Section 4 is designed to further are important and substantial. In *Capital Cities Cable, Inc. v. Crisp*, the Court held that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems"—the primary interest furthered by Section 4—is "an important and substantial federal interest." 467 U.S. at 714. The Court has also held that preventing anticompetitive conduct and promoting diversity of expression are important and substantial governmental interests. *FTC v. Superior Ct. Trial Lawyers' Ass'n*, 493 U.S. 411, 430 (1990); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567-68 (1990). Thus, the interests underlying Section 4 satisfy *O'Brien*.

Section 4 clearly furthers those interests. It prevents anticompetitive exclusion of local commercial television from the cable conduit and thereby protects noncable households from loss of free local commercial television through economic debilitation. Appellants are therefore forced to argue that Congress was wrong in concluding

[56] *Texas v. Johnson*, 491 U.S. 397, 407 (1989); *see also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

that remedial legislation is needed to protect those interests. In their view, cable operators have not engaged in anticompetitive acts against local television stations with sufficient frequency to warrant concern, and Congress should simply trust that they will not do so in the future.

There was, however, ample basis to warrant congressional concern. Congress need not wait until local commercial television is a corpse before attempting to save it.[57] After reviewing the anticompetitive abuse by the cable monopoly that had occurred in the past, analyzing the increasing incentives for cable operators to exclude broadcast competitors from the cable conduit, and recognizing cable operators' increasing ability to do so, Congress made a *predictive judgment* that, absent remedial legislation, "there is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried," and that "the economic viability of free local broadcast television and its ability to originate quality local programming *will be* seriously jeopardized." [58]

Appellants do not seriously question the evidentiary building blocks on which that predictive judgment was based. Instead, they challenge the inferences Congress drew on the basis of largely undisputed facts. Congress and appellants have considered the same evidence; they simply have drawn different conclusions.[59]

[57] Appellant Turner is surely wrong that Congress must wait until local television is in "imminent" peril of "facing extinction." Turner Br. at 19, 40. Indeed, Congress was entitled to prevent anticompetitive behavior of cable systems that would diminish broadcasters' ability to compete in the market, even if it believed the weakened stations might survive without protection.

[58] Findings, paragraphs 15, 16; J.S. App. at 86a (emphasis added).

[59] For example, Congress cited the 1988 FCC survey of the cable industry to support its predictive judgment; appellants cite the same survey to support a contrary inference. *See, e.g.*, 1992 House Report at 52; Turner Br. at 42.

In making predictive judgments about the *future* economic health of local commercial television, Congress had to weigh many complex and dynamic factors. Congress considered cable operators' strong incentive to discriminate against local commercial broadcast stations, their *only* competitors for local television advertising revenues.[60] It considered evidence that local advertising revenues are a significant and increasingly important component of cable revenues, for which broadcast stations and cable operators "increasingly compete"—revenues NCTA claimed are "becoming a more and more significant source of revenue every day."[61] It considered evidence that cable operators had already engaged in significant discrimination against local broadcast stations,[62] and evidence that cable operators were deliberately mini-

[60] *See* Findings, paragraphs 15, 16; J.S. App. 85a-86a.

[61] Findings, 14; J.S. 85a. In Comments filed with the FCC in MM Docket No. 89-600 on March 1, 1990, at p. 44, appellant NCTA candidly acknowledged that "[a]dvertising is becoming a more and more significant source of revenues every day. Between 1984 and 1989, total advertising revenues more than tripled, from $594 million to an estimated $1.963 billion. The most dramatic increase was in *local* advertising revenues, *which quintupled*—from $98 million to $488 million. By 1995, total advertising revenues are expected to climb to $4.761 billion, with *local* advertising revenues tripling again to $1.464 billion." (emphasis added). The same Comments noted "that 30 percent of cable revenues could come from non-subscriber sources, primarily advertising." *Id.* at 43. The FCC's *Report* to Congress stressed the marked increase in cable advertising revenues. 1990 FCC Cable Report, 5 FCC Rcd. at 4967. Absent competition from local broadcasters, of course, cable operators would reap monopoly profits on video advertising. That is why the advertising industry testified in support of commercial must carry legislation. *1991 Cable Act Hearing* at 353 (Statement of the Ass'n of National Advertisers); *Must Carry Hearing* at 144 (Testimony of Daniel Jaffee). Federal limits on cable rates also increase cable's incentive to augment revenue from other sources like advertising. Finally, degradation of local commercial television would cause additional viewers to subscribe to cable, despite its high cost, thus raising cable revenues in that way, as well.

[62] *See* pages 9-10 *supra*. *See generally* Goodman Aff., J.A. 99-106, and the evidence cited therein.

mizing such discrimination while must carry legislation was pending.[63] Congress considered evidence that the recent and vastly increased number of *cable* programmers, particularly those affiliated with cable operators, significantly increased both the incentive and the ability of cable operators to discriminate against local commercial television stations by substituting cable programming for broadcast programming.[64]

Congress also relied on the FCC's expert judgment that cable posed an increasing risk to local broadcasting, and to service to noncable households. For three decades—through Democratic and Republican administrations alike—the FCC had expressed concerns about that risk. As the Court explained in *Crisp*, when the FCC "began its regulation of cable communications in the 1960s," it was "chiefly concerned" that cable programming "might, through competition, destroy or seriously degrade the service offered by a television broadcaster, and thereby cause a significant reduction in service to

[63] In *Century*, the court had stressed that there had not been, in general, wide-spread discrimination against broadcast stations in the sixteen months following the invalidation of the must carry rules in *Quincy*. 835 F.2d at 303. That was no accident. As the then chairman of appellant NCTA had acknowledged six weeks after the *Quincy* decision, "a wise man doesn't insult the alligators until he's across the river." Address of Edward Allen, Chairman NCTA, Washington Cable Club, Sept. 8, 1985. That remark was cited to the FCC in support of NAB's statement that "the consideration of cable deregulation by the Commission and the Congress has no doubt restrained many cable operators." Comments of the National Association of Broadcasters, MM Docket No. 90-4, Sept. 25, 1991. Those comments were, in turn, cited in the 1992 House Report at 53.

[64] Appellant Turner acknowledges, for example, that in 1976 there were only four cable programming services; now there are more than 120. Turner Br. at 9. In 1984, just before *Quincy*, basic cable program networks spent only $340 million for programming; in 1991, they spent $1.5 billion. *Id.* Congress was aware of these facts, and understood their significance. The Senate Report, for example, noted that programming choices had increased about 50% since 1984. 1991 Senate Report at 3. Congress was particularly concerned by the extent to which the cable industry "has become vertically integrated." Findings, para. 5; J.S. App. 83a.

households *not* served by cable systems." 467 U.S. at 701 (quotations omitted) (emphasis added). The FCC's 1990 Report on Cable—which Congress considered—described an increasing risk, noting that the absence of must carry requirements had created "an imbalance between broadcasting and cable television" which posed a threat that "needs to be addressed expeditiously." [65]

Congress considered all of this evidence, and much more.[66] The evidence showed a highly dynamic industry, in which cable operators had *increasing* incentive and ability to exclude and debilitate local commercial television stations. Thus, appellants are plainly wrong that the "same alleged 'incentives' have existed during the past eight years." [67] In view of the massive record, it was plainly reasonable for Congress to conclude that absent remedial legislation, the future economic health of local commercial television would be "seriously jeopardized." [68] Indeed, even NCTA told Congress that must carry provisions were needed "to assure continued carriage on cable systems of qualified local broadcast stations." [69]

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[65] 1990 FCC Cable Report, 5 FCC Rec. at 5041 (quoted in 1992 House Report at 57).

[66] *See* pages 7-13, *supra*.

[67] Turner Br. at 44.

[68] Finding 16; J.S. App. 86a. Although the number of broadcast stations has increased in recent years, it is incorrect to conclude that broadcast stations are in strong financial health. "For example, over one-quarter of all stations affiliated with the three major television networks lost more than $197,000 in 1990," and "lost more than $477,959 in 1991." Affirmation of Dr. Mark R. Fratrik, J.A. 87-88. "In like fashion, one half of all independents lost more than $410,585 in 1990, with one quarter losing more than $1.6 million," and "lost more than $314,795 in 1991," again, "with one quarter losing more than $1.6 million." *Id.*

[69] Letter from Mr. James P. Mooney of NCTA to the Hon. Daniel K. Inouye, Jan. 17, 1990, *reprinted in Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommuns. Act Before the Subcomm. on Communs. of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

The record before Congress provided ample support for its predictive judgment regarding local commercial television's troubled financial future absent remedial legislation. Deference is particularly appropriate for findings "of a judgmental or predictive nature." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978) (deferring even to *agency* judgment). "When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). That is because Congress is "an institution better equipped to amass and evaluate the vast amounts of data bearing on [the] issue[s]." *Id.* at 330 n.12.[70] Where, as here, regulation involves an industry "dynamic in terms of technological change," this Court has acknowledged that "in evaluating the First Amendment claims [at issue], we must afford great weight to the decisions of Congress and the experience of the Commission." *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 102 (1973).[71] Finally, as appellants acknowledge, deference is particularly warranted in cases that are reviewed under *O'Brien*.[72] For all these reasons, Congress' carefully considered judgment that remedial legislation is necessary should not be disturbed.[73]

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[70] This Court's recent decision in *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993), confirms the deference due Congress' conclusions, and makes clear that statutory classifications are not subject to the level of review appropriate for decisions of agencies or trial courts.

[71] *See also Columbia Broadcasting*, 412 U.S. at 102-03 ("The judgment of the Legislative Branch cannot be ignored or undervalued" simply because one side of the debate "casts its claims under the umbrella of the First Amendment."); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67-68, 72-73 (1981).

[72] NCTA acknowledges, for example, that "the proper level of deference given to Congress varies inversely with the level of judicial scrutiny given to its actions." NCTA Br. at 39.

[73] For the reasons expressed in text and in note 68, *supra*, appellants' disputed factual assertions (see J.A. 334-339; 364-381) cannot call Congress' rejection of these claims into question in this Court.

Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978), do not require a different result. Those cases arose in the inapposite context of strict scrutiny, in which the nature of the provisions at issue—a flat ban on speech and criminalization of speech about government—raise the greatest concerns about legislative motive. Moreover, neither legislative record contained *any* findings of fact. In addition, the conclusion Congress reached in *Sable* was contradicted by an extensive agency fact-finding process on the same question in which agency had identified a clear alternative to serve the identified purpose.[74]

Sable and *Landmark* stand for the unremarkable proposition that when a law raises the kinds of concerns that require strict scrutiny, judicial inquiry into the fit between the legislature's purpose and choice of remedy is not foreclosed by the legislature's naked conclusions of *law*. But courts are not free to ignore Congressional findings of *fact* that are based on substantial record evidence. And under *O'Brien*, courts are certainly not free to engage in a *de novo* fact-finding process.

Appellants had ample opportunity to submit evidence to Congress, and they did. The dissent below erroneously believed that critical assertions of fact made by appellants in their belated effort to dispute Congress' findings were "uncontradicted." J.S. App. 55a n.3, 62a, 64a, 65a, 6a6. To the contrary, NAB and the federal defendants specifically contested those assertions of fact, on procedural grounds and on the merits. Intervenor-Defendant Applicant National Association of Broadcasters' Response to Plaintiffs' Statement of Material Facts (filed February 19, 1993). J.A. 334-339. *See* J.A. 364-381. Like the dissent, appellants' appeal also relies heavily, and inappropriately, on NCTA's contested Statement of Material Facts. *See, e.g.*, J.S. at 26-27.

[74] *Sable* held only that in the context of strict scrutiny the Court need not defer to governmental "assertions" of fact made for the first time in legal proceedings, when there were "*no* legislative findings" of fact and "*no* evidence in the record" to support those assertions. 492 U.S. at 128-29 (emphasis added).

Accordingly, Section 4 satisfies *O'Brien*'s first prong.[75]

B. Section 4 Is Narrowly Tailored.

Section 4 easily satisfies *O'Brien Ward*'s third prong because the "fit" between the statute's ends and means is far closer than is required by that test.[76] The "fit" is sufficient so long as Congress "could reasonably have determined that its interests overall would be served less effectively absent the regulation." *Ward*, 491 U.S. at 798-U.S. at 801; *Renton*, 475 U.S. at 50-52 (same); *Albertini*, 472 U.S. at 689 (same).

Congress carefully crafted Section 4 to achieve its structural objectives, striking an appropriate balance between competing interests. Cable operators are not required to carry *all* local television stations, and are free to select any programming whatsover for the majority of their channels.[77] Section 4 plainly "promotes . . . substantial government interest[s] that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798-99. *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. to the substantive problems which legitimately concern" Congress. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 810.

This Court has repeatedly held that scrutiny under *O'Brien* should be particularly circumspect when courts

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[75] As shown *supra*, Point I, Section 4 is unrelated to the suppression of free expression, and it therefore satisfies *O'Brien*'s second prong.

[76] Indeed, Section 4 would satisfy even strict scrutiny, but the court need not reach that question in order to affirm.

[77] Every "burden" imposed by Section 4 will "serve to advance [Congress'] goals" within the meaning of *Ward*. *See* 491 U.S. at 799. Section 4 is even more precisely tailored given the interaction of the retransmission consent provision. *See* page 14 *supra*. Commercial broadcasters who are likely to be carried in the absence of must carry will demand retransmission consent—thereby foregoing their must carry rights—in order to receive compensation. Section 4 will thus function to protect only those commercial broadcasters who are most at risk of being excluded from cable systems, and for whom non-carriage would have the most devastating consequences. Section 4 thus protects *precisely* those local commercial television stations that need protection.

evaluate the means government chooses to achieve its objectives. *See, e.g., Ward*, 491 U.S. at 800. "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant governmental interests." *Albertini*, 472 U.S. at 689. *Accord Clark v. CCNV*, 468 U.S. 288, 289 (1984); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978). If the "record discloses a factual basis for the [legislature's] conclusion that this kind of restriction will have the desired effect," *O'Brien* is satisfied. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).[78]

Under *O'Brien*, the means chosen by the legislature to further its interests "need not be the least restrictive or least intrusive means of doing so," *Ward*, 491 U.S. at 798, "[n]or are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689. In any event, as demonstrated above, the "A/B" switch is not an effective alternative to must carry, as Congress found.[79] Appellants' alternative suggestion, that Congress should be required to use tax dollars to subsidize local commercial broadcasting,[80] is equally without merit. In every case of anticompetitive conduct Congress could simply use tax dollars to subsidize the victims of that conduct, and allow the antitrust violator to retain the benefits of its anticompetitive behavior. Such a subsidy would protect the violator, at public expense. But such a subsidy would ill-serve Congress' procompetitive goals because it would not deter the anticompetitive behavior Congress wishes to deter. Congress was certainly not required to prefer this less effective remedy to the one it chose. Furthermore, massive governmental subsidy of local commercial broadcasters would be a serious drain

[78] *See also Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

[79] *See* pages 8-9, *supra*.

[80] *See* NCTA Br. at 41; TW Br. at 48.

on public resources, and would inject an unwanted governmental presence into what has long been a privately owned medium.[81]

For these reasons, Section 4 fully satisfies the *O'Brien* test.

III. SECTION 4 REQUIRES ONLY RATIONAL BASIS SCRUTINY.

The district court correctly concluded that Section 4 fully satisfies the *O'Brien/Ward* test, but appellants' claims should have been dismissed pursuant to the rational basis test. Appellants' "compelled speech" and "editorial discretion" claims are indistinguishable from claims rejected under the rational basis test in *PruneYard*, and appellants' "discrimination" claims are indistinguishable from claims rejected under the rational basis test in *Leathers*.[82] Because Section 4 satisfies the more demanding *O'Brien/Ward* test, it plainly satisfies the rational basis test. *See generally FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993).[83]

[81] *See generally FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

[82] An antitrust injunction forbidding exclusionary practices by a cable monopolist would not be subjected to First Amendment scrutiny.

[83] Alternatively, the District Court could have upheld Section 4 under a cable-specific standard of review. *See* NAB Motion to Affirm in No. 93-44, at 24-30. We emphasize, however, that such a standard would only be appropriate for reviewing regulations guaranteeing viewpoint-neutral *access* to the cable *conduit*.

CONCLUSION

The decision of the three-judge district court should be affirmed.

Respectfully submitted.

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